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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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DEC 15 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC 00-81
File No.

In the Matter of)

Petition of U S WEST, Inc. for)

Declaratory Ruling Preempting State)
Commission Proceedings to Regulate)
U S WEST's Provision of Federally Tariffed)
Interstate Service)
_____)

To: The Commission

PETITION FOR DECLARATORY RULING

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SUMMARY

AT&T recently has filed five complaints that ask state public utility commissions to determine the terms and conditions for the provisioning of services ordered by AT&T under U S WEST's *federal* exchange access tariff, Tariff F.C.C. No. 5. The crux of AT&T's argument is that, because AT&T has elected to use U S WEST's interstate access services to carry some intrastate traffic, state commissions have jurisdiction to regulate the terms and conditions on which U S WEST provides services under this federal tariff. But state commissions lack jurisdiction to engage in such regulation. In enacting the Communications Act, Congress divested state commissions of any authority to regulate interstate services offered under federal tariffs.

The Commission should make clear that Title II of the Act occupies the field with respect to complaints arising out of services offered under federal tariffs. In Title II, Congress set forth a pervasive scheme of federal regulation to govern federally tariffed telecommunications services. Permitting AT&T's complaints to proceed in state fora would frustrate Congress's statutory intent to establish the Commission's exclusive jurisdiction over federally tariffed services.

AT&T's complaints are also barred by section 203(c) of the Act and the filed rate doctrine, because they seek relief that would be inconsistent with the terms and conditions of U S WEST's Tariff F.C.C. No. 5. U S WEST is prohibited from providing interstate access service to AT&T except under the specific terms set forth in the tariff itself. Those terms include very specific standards for provisioning as well as limitations on liability and remedies that are flatly inconsistent with the relief sought by AT&T. Accordingly, section 203(c) and the filed rate doctrine present an absolute bar to AT&T's service-related claims.

Finally, preemption is warranted because a grant of AT&T's requested relief would interfere with the Commission's statutorily mandated control over interstate communications. it is neither technically nor practically feasible to sever the act of provisioning of a circuit into federal and state components. Therefore, if the state commissions grant AT&T the relief it seeks in its complaints, state regulators will dictate timetables and criteria, and define unlawful discrimination, for provisioning interstate circuits.

U S WEST accordingly requests that the Commission exercise its authority pursuant to section 1.2 of its rules and section 5(d) of the Administrative Procedure Act to declare that the state commission proceedings on AT&T's complaints are preempted by federal law. If AT&T's service-quality complaints are allowed to proceed, the Commission's statutory duty to regulate interstate communications will be seriously compromised, and U S WEST will be forced to defend in numerous state commission proceedings the manner in which it provisions federally tariffed interstate services.

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Interstate Service)

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To: The Commission

PETITION FOR DECLARATORY RULING

Pursuant to section 1.2 of the Commission's rules and section 5(d) of the Administrative Procedure Act,^{1/} U S WEST, Inc. ("U S WEST") respectfully requests that the Commission issue a declaratory ruling that proceedings recently brought by AT&T before five state public utilities commissions, seeking to set terms and conditions for the provisioning of service ordered by AT&T under U S WEST's *federal* exchange access tariff, are preempted by federal law.

AT&T contends that U S WEST has not provided interstate access services in accordance with U S WEST's commitments to AT&T, and that U S WEST has discriminated against AT&T in the provisioning of those services. U S WEST provides interstate access services subject to extensive regulation by the Commission, and U S WEST's Tariff F.C.C. No. 5 sets forth the specific terms and conditions on which U S WEST offers those services, including specific commitments, limitations of liability, and remedies with respect to provisioning. But AT&T has not challenged U S WEST's provisioning of access services under the Communications Act or the

^{1/} 47 C.F.R. § 1.2; 5 U.S.C. § 554(d).

Commission's rules. Instead, AT&T has sought to bypass Commission jurisdiction by filing complaints with state commissions. The crux of AT&T's argument is that, because AT&T has elected to use U S WEST's interstate access services to carry some intrastate traffic, state commissions have jurisdiction to regulate the terms and conditions on which U S WEST provides service under federal tariff. At least two of the state commissions recently have issued decisions concluding that this Commission does not have exclusive jurisdiction over AT&T's complaints about U S WEST's federally tariffed services, and allowing the complaint proceedings to go forward.

These state proceedings are preempted by section 2(a) of the Communications Act, because they trespass on the Commission's exclusive jurisdiction to regulate interstate communications services. The proceedings are preempted also by section 203(c) of the Act and the filed rate doctrine, because they seek relief that would be flatly inconsistent with the terms and conditions of FCC Tariff F.C.C. No. 5. Even if AT&T uses U S WEST's services under Tariff F.C.C. No. 5 to transport some intrastate communications, U S WEST's provisioning of those services to carry intrastate communications is inseverable from provisioning the same services for interstate use.

Accordingly, the Commission should issue a declaratory ruling that the Communications Act occupies the field with respect to regulation of services offered pursuant to tariffs filed with the Commission. If AT&T's complaints are allowed to proceed, the Commission's jurisdiction to regulate the provisioning of interstate access services will be significantly compromised and U S WEST will be forced to defend before numerous state commissions the manner in which it provisions its federally tariffed interstate services. A declaratory ruling is also appropriate to

remove the state commissions' apparent uncertainty about the scope of the Commission's jurisdiction over the regulation of intrastate traffic carried via interstate services.

Background

AT&T's complaints before each of the state commissions relate to the installation and provisioning of U S WEST's interstate access services.^{2/} In each complaint proceeding, AT&T alleges that U S WEST has (1) failed to provide AT&T with the facilities necessary for access services, (2) failed to provision those facilities on a timely basis in accordance with certain quality measures, and (3) favored itself, or its own affiliates, in provisioning the facilities it did provide. AT&T has not disputed that virtually all of the access services that are the subject of its complaints are interstate services taken under federal tariff.

A. Washington Proceeding

AT&T asserted that the Washington Utilities and Transportation Commission ("WUTC") has jurisdiction over its claims against U S WEST under various provisions of Washington law, including state utility law provisions prohibiting "unreasonable practices" and "undue preferences." *See* Complaint and Request for Expedited Treatment of AT&T Communications of the Pacific Northwest, Docket No. UT-991292 (Wash. UTC Aug. 18, 1999) (Attachment 1), *citing* RCW 80.36.160; RCW 80.36.170. In its motion to dismiss AT&T's complaint, U S WEST demonstrated that 2 out of the 70 held orders at issue were for interstate services provided to AT&T under U S WEST's federal tariff. *See* U S WEST's Motion to Dismiss, No. UT-991292, at 2; Declaration of Elizabeth Quintana at 1. U S WEST argued that the WUTC lacks jurisdiction to consider AT&T's complaints because this Commission has exclusive jurisdiction

^{2/} AT&T filed all five complaints on August 18, 1999.

over U S WEST's interstate services under the Communications Act; the filed rate doctrine bars AT&T from obtaining interstate access service from U S WEST on terms and conditions other than those set forth in Tariff F.C.C. No. 5; and the Commission's mixed-use facilities rule, which assigns to the interstate jurisdiction mixed-use access lines used to transport traffic that is 10% or more interstate, requires that U S WEST's services over those lines be treated as interstate and subject to the exclusive jurisdiction of the Commission.

In response, AT&T did not dispute that almost all of its allegations concern services taken out of U S WEST's federal tariff. *See* AT&T Response to U S WEST Motion to Dismiss at 3. Instead, AT&T argued that the WUTC has full jurisdiction over AT&T's claims because of the “definite and substantial intrastate components” of the federally tariffed access services provided by U S WEST. *See id.*

In its November 12, 1999 decision, the WUTC concluded that it has jurisdiction to hear AT&T's complaint because “[t]he FCC has not in any way clearly provided” for preemption. Third Supplemental Order of the WUTC, Docket No. UT-991292, at p. 4 (Nov. 12, 1999) (Attachment 2). Thus, “[i]n the absence of clear authority that a customer's election to take service under a federal tariff per the 'ten percent rule' preempts all state regulatory authority, we decline to so rule.” *Id.* at pp. 4-5.

B. Colorado Proceeding

In response to AT&T's Colorado complaint, *see* Complaint and Request for Expedited Treatment of AT&T Communications of the Mountain States, Docket No. 99F-404T (Colo. PUC Aug. 18, 1999), U S WEST sought summary judgment “on all claims related to access services purchased under federal tariff.” U S WEST Motion for Final Summary Judgment, Docket No.

99F-404T, at 3. U S WEST argued, among other things, that the Colorado commission lacks jurisdiction over federally tariffed services; the filed rate doctrine preempts AT&T complaints; and the Commission has exclusive jurisdiction based on the mixed-use facilities rule (or the 10% contamination rule). U S WEST demonstrated to the Colorado commission that 96 out of 97 held orders and all of the missed orders at issue were purchased out of U S WEST's Tariff F.C.C. No. 5. *See* Affidavit of Phyllis Sunnis at 2. On November 15, 1999, a commission ALJ dismissed U S WEST's motion on the ground that genuine issues of material fact remained as to the nature of the traffic transported on the interstate circuits provided by U S WEST. *See* Interim Order of ALJ at 4.

C. Minnesota, Arizona, and New Mexico Proceedings

AT&T also filed similar complaints in Minnesota, Arizona, and New Mexico on August 18, 1999. *See AT&T Communications of the Midwest*, Docket No. P421/C-99-1183 (Minn. PUC, Aug. 18, 1999); *AT&T Communications of the Mountain States*, Docket No. T-01051B-99-0476 (Az. Corp. Comm., Aug. 18, 1999); *AT&T Communications of the Mountain States*, Docket No. T-01051B-99-0476 (NM PRC, Aug. 18, 1999). U S WEST filed a Motion for Partial Summary Judgment in the Minnesota proceeding on November 24, 1999. The state commission issued an order requesting comments on that motion by December 17, 1999.^{3/} On October 25, 1999, the Arizona Commission issued an order granting U S WEST's Motion For a More Definite Statement with respect to the held orders alleged in AT&T's Arizona Complaint. *See* Procedural Order at 3. U S WEST's time to answer that complaint has not yet run. In New

^{3/} In its pleadings before the WUTC, AT&T incorrectly asserted that the Minnesota PUC has found jurisdiction over its service-related claims. *See* AT&T's Response to U S WEST's Motion to Dismiss, Docket No. UT-991292, at 10.

Mexico, applicable statutes require the state commission to make a finding of probable cause before AT&T's complaint may be heard. To date, the commission has not made such a finding.

ARGUMENT

I. THE COMMISSION SHOULD MAKE CLEAR THAT TITLE II OF THE ACT OCCUPIES THE FIELD WITH RESPECT TO COMPLAINTS ARISING OUT OF SERVICES OFFERED UNDER FEDERAL TARIFFS.

In enacting the Communications Act, Congress left no room for states to engage in the regulation of federally tariffed services. First, Congress placed the regulation of all interstate communications explicitly within the sphere of federal jurisdiction. Section 2(a) of the Act grants the Commission sole and exclusive jurisdiction over all interstate and foreign wire communications. 47 U.S.C. § 152(a) (empowering the FCC to regulate “all interstate and foreign communication by wire or radio”).^{4/} Congress established a pervasive scheme of federal regulation to govern federally tariffed telecommunications services. Section 203 requires all carriers to file tariffs of their charges for interstate wire services, and prohibits them from employing any classifications, regulations, or practices affecting such charges other than as so published.^{5/} Section 204 of the Act provides for Commission review of proposed tariffs.^{6/} Sections 201 and 202 vest the Commission with jurisdiction to define unjust and unreasonable charges and practices and to address undue preferences in connection with federally tariffed

^{4/} Purely intrastate communications, on the other hand, are to be regulated by the states. *See* 47 U.S.C. § 152(b) (“[n]othing . . . shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services . . . for or in connection with intrastate communication[s]”).

^{5/} *Id.* § 203(a).

^{6/} *Id.* § 204.

services.^{7/} And sections 207 and 208 provide specific procedures and remedies for customers to assert claims that a carrier has failed to provision its service in accordance with the publicly filed schedule or tariff.^{8/} In short, Congress fully occupied the relevant field, and state commissions are thus precluded from regulating services taken out of U S WEST's federal tariffs. *See e.g., Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (state law is preempted where federal law so thoroughly occupies the field that states are left no room to supplement it); *Fidelity Savings & Loan v. De la Cuesta*, 458 U.S. 141, 153 (1982) (same).

It is no answer that a customer may use an interstate access service to transport some intrastate traffic. The Commission's rule for the last decade has been that, if 10 percent or more of the traffic carried by an access line is interstate, the service must be "assigned to the interstate jurisdiction." *MTS/WATS Market Structure Order*, 4 FCC Rcd 5660, ¶ 2 (1990).^{9/} *See also GTE Telephone Operating Companies*, 13 FCC Rcd 22466 (1999) (ADSL service "is similar to existing . . . access services that are *subject to federal regulation* under the mixed-use facilities rule." (emphasis added)).

^{7/} *See id.* §§ 201, 202.

^{8/} Section 207 provides that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter." *Id.* § 207. Section 208 provides that "[a]ny person . . . complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof . . . may apply to said Commission by petition . . ." *Id.* § 208.

^{9/} The rule is codified at 47 C.F.R. § 36.154(a) Subcategory 1.2. The rule provides that "[t]his subcategory shall include . . . private lines and WATS lines carrying both state and interstate traffic if the interstate traffic on the line involved constitutes more than ten percent of the total traffic on the line."

If AT&T wanted to invoke the jurisdiction of state commissions over U S WEST services used to carry intrastate traffic, AT&T needed simply to order service out of U S WEST's state tariffs. Section 2.1.1 of Tariff F.C.C. No. 5 provides that,

[i]f the . . . interstate traffic on the service involved constitutes more than ten percent of the total traffic . . . the service will be provided in accordance with the applicable rules and regulations of this Tariff. . . . [i]f the interstate traffic . . . should change . . . to ten percent or less . . . *the service requires a change in jurisdiction.*

Tariff F.C.C. No. 5 § 2.3.11 (emphasis added). Once AT&T opted for U S WEST's federal tariff, however, it subjected itself to the federal statutory scheme and the Commission's rules. As soon as a service is deemed to be governed by federal law, that is the end of the matter: the Act divests the states of any authority to regulate it. As AT&T itself argued succinctly before the Illinois Commission in late 1997:

if the interstate traffic on the dedicated access circuit constitutes more than 10% of the total traffic, the service is classified as interstate and subject to the interstate jurisdiction of the FCC -- *in its entirety and for all purposes.* (Emphasis in original.)

Illinois Bell Telephone Company d/b/a/ Ameritech Illinois v. AT&T Corp. and AT&T

Communications of Illinois, 1998 Ill. PUC LEXIS 139, *28 (Feb. 27, 1998) (outlining position of AT&T). The Illinois PUC hearing examiner agreed, concluding that "[t]hose dedicated access facilities classified as interstate are subject to the exclusive jurisdiction of the FCC." *Id.* * 37.

In short, Congress has entirely occupied the field of regulating federally tariffed communications services. To permit AT&T's complaints about federally tariffed services to proceed in state fora would frustrate Congress's statutory intent to establish this Commission's exclusive control over those services.

II. SECTION 203(c) AND THE FILED RATE DOCTRINE PROHIBIT U S WEST FROM PROVIDING INTERSTATE ACCESS SERVICE EXCEPT AS SET FORTH IN THE TARIFF ITSELF.

The Communications Act requires common carriers such as U S WEST to file tariffs with the Commission showing all charges as well as the classifications, practices, and regulations affecting such charges. 47 U.S.C. § 203(a). Once filed with the Commission, a tariff exclusively controls the rights and liabilities of the parties as a matter of law and supersedes all other agreements between the parties; carriers are prohibited from charging customers except as specified in their tariffs. *Id.* § 203(c); *see e.g., Carter v. AT&T*, 365 F.2d 486, 496 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967) (the filed tariff is not a mere contract; it is the law); *Marcus v. AT&T*, 138 F.3d 46, 56 (2d Cir. 1997) (“federal tariffs are the law”). This “filed rate doctrine” prevents an aggrieved customer from enforcing rights not expressly granted by the terms of the tariff. *Maislin Industries v. Primary Steel*, 497 U.S. 116 (1990); *Transportation Data Interchange, Inc. v. AT&T Corp.*, 920 F.Supp. 86 (D.Md. 1996); *Cooperative Communications, Inc. v. AT&T Corp.*, 867 F.Supp. 1511 (D.Utah. 1994).

Section 203(c) and the filed rate doctrine are an absolute bar to AT&T's claims for relief. *See e.g., Fax Telecommunications v. AT&T*, 138 F.3d 479 (2d. Cir. 1997) (customer simply cannot enforce rates and terms “not consistent with the tariff”). U S WEST's Tariff F.C.C. No. 5 comprehensively governs the terms and provisions for the ordering, installation, and provisioning of the interstate access services giving rise to AT&T's state law complaints. As shown below, the tariff provides service dates, performance guarantees, and customer remedies with respect to the very matters addressed by AT&T complaints. AT&T's complaints seek to force U S WEST to provide these interstate access services on terms and conditions that differ from those in U S

WEST's federal tariff. AT&T also alleges that it should be entitled to different provisioning benefits under an agreement with U S WEST rather than the terms of the tariff itself. *See e.g.*, AT&T Complaint and Request for Expedited Treatment, Docket No. UT-991292, at 17. While this allegation is wrong, section 203(c) and the filed rate doctrine would preempt any such agreement in any event.

Section 5 of the tariff sets forth in exhaustive detail generally applicable ordering information, service dates, and performance remedies. Section 5.1.1 provides that, when a customer places an order, U S WEST will establish a Service Date and “provide a firm order confirmation to the customer advising the customer [of] the Application Date and the associated Service Date Intervals for the Access Order.” *Id.* § 5.1.1. If U S WEST misses a service date due to circumstances within its control, the tariff provides a specific remedy: “the customer may cancel an Access Order without incurring cancellation charges.” *Id.* § 5.2.3. Accordingly, customers claiming untimely installation of facilities for access services are granted a specific, tariff-based remedy. Likewise, section 5 provides service guarantees for the provisioning of access services. *Id.* § 5.2.1. Section 5.2, for example, provides that “Service Guarantee Provisioning assures that provisioning requests . . . are installed on the Service Date committed by the company.” *Id.* Once again, a specific remedy is furnished for lapses in meeting provisioning requests -- “a credit shall be applied to the customer's bill.” *Id.* The tariff sets forth general provisions governing credit allowances for service interruptions. *Id.* § 2.4.4. Accordingly, customers claiming inadequate provisioning of facilities are also granted specific tariff-based relief mechanisms.

The tariff also provides certain service-specific provisions regarding U S WEST's provisioning of private line services. For example, the tariff provides that certain private line services will only be "provided where facilities are available." *Id.* § 7.2.6.B.2.4. Moreover, the tariff sets forth discrete repair and service guarantees for certain specific private line services. *See id.* § 2.4.4.B.1. For example, the tariff provides that Low Speed Data private line transport service "will be restored within four (4) hours from the time the interruption was reported by the customer. . . . [f]ailure to meet this commitment will result in a credit." *Id.*

U S WEST's tariff also makes clear that U S WEST "does not warrant that its facilities and services meet standards other than those set forth in the tariff," *id.* § 2.1, and that U S WEST may be legally obligated to furnish access services only "to the extent that such services are or can be made available with reasonable effort." *Id.* § 2.1.4. Thus, U S WEST is obligated to meet only those service-quality guarantees and performance standards set forth in the tariff itself.

If AT&T believes that these or other provisions of U S WEST's federal tariff are unreasonable or unlawful, the Act allows AT&T to bring such claims *to this Commission*. As noted above, sections 201 and 202 of the Act vest the Commission with jurisdiction to define unjust, unreasonable and discriminatory practices. And sections 207 and 208 of the Act furnish complaining parties with statutory remedies: section 207 provides that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter may . . . make complaint to the Commission, " 47 U.S.C. § 207, and section 208 provides that "[a]ny person . . . complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof . . . may apply to said Commission by petition." *Id.* § 208. Nevertheless, AT&T has filed no such claims with the Commission.

By bringing its service-related claims before various state commissions, AT&T seeks nothing more than an enlargement of the rights conferred by the tariff, which would not be available to other customers.^{10/} The Supreme Court has repeatedly barred such claims. “The rights as defined by the tariff cannot be varied or enlarged.” *See American Telephone & Telegraph v. Central Office Telephone*, 524 U.S. 214 (1998); *see also, Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915). In *Central Office*, a reseller of long distance communications services (Central Office) sued AT&T, a provider of long distance services, under state law for breach of contract and tortious interference with contract. Central Office asserted that, even if certain rate-based claims were barred by the filed rate doctrine, the doctrine clearly did not apply to any of its claims regarding the *provisioning of services*. The Supreme Court rejected that assertion, concluding that

[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa. If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge.

237 U.S. at 223. The same principle applies here. AT&T's service provisioning claims plainly implicate filed rates, because any customer would expect to pay higher rates for the additional service-quality guarantees AT&T seeks to extract through its state commission actions.

Adherence to AT&T's unilaterally-asserted service provisioning standards for the same rate as that charged other customers (as the basis of some alleged agreement to provide these standards

^{10/} Indeed, the relief AT&T requests could potentially lead to charges that U S WEST is granting “undue or unreasonable preferences” in violation of section 202(a) of the Act. Section 202(a) was designed to prevent the sort of unfair discrimination AT&T seeks to extract through its state commission actions (*i.e.*, superior terms and conditions than those offered to U S WEST's other interstate access customers).

for federally tariffed services) would constitute a discriminatory “privilege” within the meaning of section 203(c) of the Act. Consequently, AT&T's claims are barred by section 203(c) and the filed rate doctrine.

III. PREEMPTION IS REQUIRED BECAUSE A GRANT OF AT&T'S REQUESTED RELIEF WOULD INTERFERE WITH THE COMMISSION'S STATUTORILY MANDATED CONTROL OVER INTERSTATE COMMUNICATIONS.

As shown above, the jurisdictional provisions and structure of Title II of the Act, and section 203 of the Act as interpreted by the filed rate doctrine, prohibit state commissions from imposing any requirements with respect to U S WEST's federally tariffed interstate access services. The Commission not only should declare that the Communications Act gives it exclusive jurisdiction to regulate the provision of services offered under FCC tariffs. It also should exercise its established authority to preempt such state commission proceedings at issue here, because the subject matter of those proceedings cannot be separated from the matters covered by Commission regulation.

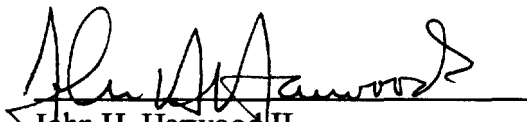
It is well established that the Commission may preempt state action “where it is not possible to separate the interstate and the intrastate components” of the service being regulated and where, due to this inseverability, state action “may negate the exercise by the FCC of its . . . lawful control over interstate communications.” *Illinois Bell v. FCC*, 883 F.2d 104, 114-115 (D.C. Cir. 1989) (state regulation must be confined to intrastate matters which are “separable from” interstate communications); *see also Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 373 (1986). Commission preemption is required in this case because AT&T's service-related complaints, if granted, would result in state regulation of *interstate* (as well as intrastate) communications in violation of the Act.

In the prayers for relief set forth in its state commission complaints, AT&T has asked state regulators to order U S WEST to (1) provision necessary access facilities in accordance with performance criteria set forth in AT&T's complaints; (2) cease subsidizing its competitive business ventures with rates received from noncompetitive services; and (3) immediately fill all of AT&T's outstanding held orders. If AT&T succeeds in obtaining such relief, state regulators will dictate timetables and criteria, and define unlawful discrimination, for provisioning interstate circuits. AT&T may elect to use a circuit to carry both intrastate and interstate traffic, but U S WEST provisions such a circuit in a single act. It is neither technically nor practically feasible to sever the provisioning of a circuit into federal and state components. As in *Illinois Bell Telephone v. FCC*, 883 F.2d 104 (D.C. Cir. 1989), "the intrastate and interstate elements . . . *cannot be severed into discrete packages* so as to permit separate state and federal regulation of the manner in which these services are [jointly provisioned]." *Accord, North Carolina Utilities Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (FCC may preempt state regulation of telephone terminal equipment used for both interstate and intrastate communications); *Texas PUC v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) (preempting state interconnection restriction as inherently affecting customer's right to interconnect for purpose of interstate communications); *Public Service Comm'n of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990) (preempting states from setting rates charged to long distance carriers for cutting off service to nonpaying customers). The Commission accordingly should declare that state regulation of the provisioning of interstate access services is preempted.

CONCLUSION

U S WEST respectfully requests that the Commission issue a declaratory ruling that proceedings recently brought by AT&T before five state public utilities commissions, seeking to establish standards and remedies for the provisioning of services ordered by AT&T under U S WEST's *federal* interstate access tariffs, are preempted by federal law.

Respectfully submitted,



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December 15, 1999

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE)	DOCKET NO. <u> CIT 991292 </u>
COMPLAINT AND REQUEST FOR)	
EXPEDITED TREATMENT OF AT&T)	COMPLAINT AND REQUEST FOR
COMMUNICATIONS OF THE PACIFIC)	EXPEDITED TREATMENT OF
NORTHWEST, INC. AGAINST)	AT&T COMMUNICATIONS OF THE
U S WEST COMMUNICATIONS, INC.)	PACIFIC NORTHWEST, INC.
REGARDING PROVISIONING OF		
ACCESS SERVICES		

AT&T Communications of the Pacific Northwest, Inc. ("AT&T") seeks relief regarding the inadequate and inconsistent quality of access services being provided by U S WEST Communications, Inc. ("U S WEST"). U S WEST's failures regarding access services include (1) an unwillingness to provide facilities necessary for access services; (2) an unwillingness to timely provision those facilities it does provide in violation of agreed upon measures of quality, and (3) a practice of favoring itself, its affiliates, its own customers and certain communities in deciding where to provision facilities.

These performance deficiencies by U S WEST have hindered AT&T's ability to provide consistently high quality interexchange services to Washington businesses and consumers and, in numerous cases, have made it impossible for AT&T to offer such services at all. Businesses and consumers in Washington are suffering due to U S WEST's inaction. Moreover, due to its failures, U S WEST is unfairly discriminating against AT&T, and giving itself superior treatment. Such conduct and its results are contrary to the public interest, contrary to prior agreements between the parties, and contrary to Washington law.

AT&T further requests expedited treatment of this Complaint since customers are out of service and AT&T has exhausted all efforts at informal resolution.

In support of its Complaint, AT&T states the following:

PARTIES

1. AT&T is a telecommunications carrier registered and competitively classified to provide interexchange and local telecommunications services in Washington under authority of this Commission. AT&T's address for the U S WEST region is 1875 Lawrence Street, Denver, Colorado 80202, and AT&T's address for the state of Washington is 1501 South Capitol Way, Suite 204, Olympia, Washington 98501-2200.

2. U S WEST is a telephone company authorized to provide telecommunications services in Washington, including the access services at issue in this Complaint. U S WEST provides basic local exchange service, access lines and usage within local calling areas in Washington for the transmission of two-way interactive voice and data communications. U S WEST's principal place of business in Washington is 1600 7th Avenue, Room 3206, Seattle, Washington 98191.

JURISDICTION

3. The Commission has jurisdiction over U S WEST because U S WEST is a public service company regulated by the Commission as to rates and services. RCW 80.01.040(3). The Commission has jurisdiction to entertain and resolve this Complaint under the following authority: RCW 80.01.040, RCW 80.04.110, RCW 80.36.080, RCW 80.36.090, RCW 80.36.160, RCW 80.36.170, RCW 80.36.186, RCW 80.36.260,

WAC 80-36-300, WAC 480-09-420, WAC 480-120-051, WAC 480-120-101, WAC 480-120-535.

4. The Commission has primary jurisdiction, under both RCW 80.36.170 and 80.36.186, to “determine whether any...practice of a telecommunications company violates this section.”

5. As provided in WAC 80.36.300(4), it is the policy of the state of Washington to “ensure that rates for noncompetitive telecommunications services do not subsidize the competitive ventures of regulated telecommunications companies.”

6. As provided in RCW 80.36.140, the Commission is charged with determining whether the practices of a telecommunications company are “inadequate, inefficient, improper or insufficient” and to “fix the same by order or rule as provided.”

FACTUAL ALLEGATIONS

The Nature Of The Access Services At Issue.

7. “Access Service” refers to access to a local exchange network for the purpose of enabling a provider to originate or terminate interexchange telecommunications services. There are two general types of access service: dedicated access service and switched access service. Dedicated access service refers to the use of a direct call path provided by a local exchange carrier (“LEC”) – such as U S WEST – linking a long-distance carrier to an end-user for the provisioning of a private line or dedicated telecommunications service. Switched access service refers to the origination and termination of calls that use a local exchange carrier’s local switching capabilities. This Complaint addresses both dedicated and switched access services.

8. Switched access includes several access components to enable the origination and termination of switched calls (such as Plain Old Telephone Service) from a long distance carrier through the LEC's network to the customer's phone. The switched access components provided by the LEC include: the loop, the local switch, interoffice facilities and potentially tandem switching if the local switch is not directly connected to the customer's long distance or interexchange carrier. In addition, there are some supporting capabilities that enable the network such as signaling.

9. The "loop" is simply defined as the facility from the customer's premises to the local switch. At the local switch, the loop is connected to a port on the switch. The local switch is responsible for understanding whether a specific number dialed is a local, intraLATA toll or interLATA toll call and determining the appropriate routing.

10. The "interoffice facility" is defined as the facility (or several facilities) that connects the local or tandem switch to the long distance or interexchange carriers' network, or it can be located between multiple offices within the U S WEST network. For an interoffice facility that connects to a long distance or interexchange carrier's network, the point of interconnection is at a Point of Presence ("POP") of the long distance or interexchange carrier's network.

11. Blockage or lack of capacity in interoffice facilities will cause customers to be incapable of originating or terminating calls once a certain volume of calls has been reached, and will not allow communities or businesses to grow.

12. Access service includes, inter alia, both DS0 and DS1 service. DS0 service is capable of supporting single voice conversations or 64 kilobits of data per second in various combinations. This service is generally used to establish a dedicated

line within a customer's network. DS1 service is capable of supporting up to 24 voice grade conversations simultaneously or 1.544 megabits of data per second in various combinations (i.e., 12 DS0 of voice and 12 DS0 of data). Because of the greater capacity, DS1 services can accommodate higher speed transmissions. Larger volume customers can reduce their expenses by taking advantage of this high capacity technology if they have sufficient volume to support a DS1.

13. Although this Complaint addresses DS0 and DS1 service, the problems and concerns that are discussed herein also apply when customers order higher bandwidth service from AT&T.

14. AT&T is U S WEST's single largest access service customer. For example, in Washington, alone, AT&T purchased over \$119 million of access services from U S WEST during 1997 and over \$96 million in 1998.

15. Access services provided by U S WEST are regulated, non-competitive monopoly services. See WAC 480-120-022, 480-120-023. They are not available to AT&T in Washington from any other source on the broad basis supplied by U S WEST in its serving territories.

16. Access services are essential for AT&T to provide competitive and high-quality interexchange services to Washington businesses and consumers. Without high-quality access service, AT&T is unable to provide the type of quality telecommunications services that its end-users demand and require. In cases where U S WEST simply refuses to provision access facilities, AT&T is unable to offer interexchange services to requesting customers at all.